Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of	)	
	)	WC Docket No. 02-112
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	

COMMENTS OF TOUCH AMERICA HOLDINGS, INC.

Touch America Holdings, Inc., parent of Touch America, Inc. ("Touch America"), by its attorneys, hereby submits the following comments in the above-captioned proceeding.

Introduction

Touch America is a debt-free national and international telecommunications service provider. By 2003, its technologically advanced, high-speed, domestic fiber optic backbone network will extend 26,000 miles. Touch America has been involved in providing telecommunications services for over a quarter of a century.

In early 2000, Touch America sought to expand its industry presence by agreeing to purchase the in-region,[1] interLATA (and intraLATA) customers of Qwest Communications International Inc. and its subsidiaries (collectively, "Qwest"), as well as Qwest's in-region assets needed to serve these customers. The Commission approved Qwest's proposed divesture of

[1] Qwest's "in-region" territory comprises the 14 states in the Midwestern and Northwestern area of the country, including Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, N. Dakota, Oregon, S. Dakota, Utah, Washington, and Wyoming.

these customers and assets to Touch America on June 26, 2000, paving the way for Qwest to merge with the former BOC, US WEST Communications, Inc. ("US WEST"), four days later.[2]

In the two years since Qwest's merger closed, Touch America has battled Qwest continuously (at first privately and now before the courts and this Commission) to obtain its rights to and ability to serve the in-region customers it purchased. However, as its two formal complaints against Qwest now pending before this Commission attest,[3] Qwest has unlawfully frustrated Touch America's ability to take over those assets and Qwest's in-region, interLATA operations. Qwest's unlawful conduct continues today.

Comments

The fact finding the instant proceeding is intended to produce is to be used by the Commission to evaluate, as provided for by Section 272 of the Communications Act, 47 U.S.C. § 272(f)(1), whether the separate affiliate requirement imposed on BOCs when they provide in-region interLATA services should be "sunset." Touch America submits that this requirement should not be sunset and instead needs to be continued indefinitely.

Touch America will not engage in an exhaustive dissertation of the reasons underlying its position. None is really needed. The basis of Touch America's position that the BOC separate affiliate requirement needs to be retained may be briefly summarized as follows.

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[2] In the Matter of Qwest Communications International Inc. and US WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd. 11909 (2000) ("*Divestiture Order*").

[3] *See* File No. EB-02-MD-003 (alleging Qwest's sale of "Capacity IRUs" are in essence long-distance voice and data telecommunications services that specifically violate section 271) ("*IRU Complaint*") and File No. EB-02-MD-004 (challenging Qwest's compliance with FCC Merger and Divestiture Orders and alleging Qwest has violated or is presently violating sections 201, 202 and section 271 of the Telecommunications Act of 1996, by engaging in unreasonable and discriminatory activities and failing to fully divest its long-distance business and cease providing in-region long distance services) ("*Divestiture Complaint*").

The long distance or "interLATA" industry is in an unprecedented state of change with many of the largest incumbent long distance carriers having to deal with an uncertain market and economy and with changing consumer demands for such services. Even with the existing separate affiliate requirement in place, the Commission's decisions to permit the expansion of BOCs into the long distance markets of several states has placed further competitive burdens on long distance carriers who simply cannot replicate the BOCs' untouched dominance of local exchange services and newfound ability to offer such services in combination with interLATA services. Under these conditions, lessening any requirement that provides some hedge against the BOCs' abuse of and ability and proclivity to abuse their dominance is contrary to the competitive purposes of the 1996 Act and therefore contrary to the public interest.

The deleterious effects of sunsetting the separate affiliate requirement is shown first by the historical record. In the mid-1980s, the Commission did away with a BOC separate subsidiary requirement in the first major effort to open the monopoly local markets to competition.[4] The Commission's plan then was known as Open Network Architecture (or "ONA Plan").

As originally adopted, competition in enhanced services was to be fostered by a complex system of network components that were to be made available to competitive enhanced service providers ("ESPs"). Using this availability, ESPs were to be able to compete with the incumbent BOCs to provide enhanced services to the public. By requiring that these network components be available on a non-discriminatory basis, and by making the BOCs gain access to the same components, but through a structurally separate subsidiary, the Commission sought to provide

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[4] Amendment of Sections 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, FCC No. 86-252 (released June 16, 1986) ("*Computer III Decision*").

the benefits of competition and to open the entrenched local exchange facilities to more innovative services provided by new entrants into the marketplace.[5]

But within a short time after the ONA plan was put into effect, the Commission succumbed to the entreaties of the BOCs and lifted the separate subsidiary requirement.[6] It is not contended that the ONA plan's failure is wholly attributable to the Commission's having lifted the separate subsidiary requirement – though it was certainly a factor. There were many other flaws in the ONA plan that contributed to its failure to open the local networks to effective competition in enhanced services, the obvious ones being the BOCs' continued and unabated ability to game the ONA plan itself, the plan's complexity, and the BOCs' control over the implementation of the ONA plan and the very instruments needed to make the plan work. But, by removing the separate subsidiary requirement too early and thereby allowing the BOCs to operate under one roof, the ONA experiment was doomed to failure because removing the separate subsidiary requirement made it that much easier for the BOCs to "game the system." That the BOCs could, would and ultimately did conceal their misdeeds and anticompetitive and discriminatory conduct is proven out in the fact that competition, as envisioned by the Computer Inquiries, never truly materialized.

The same will be repeated here if the separate affiliate requirement is sunsetted before any real and substantial competition has entered into the local markets. As evidenced in its two complaints, Qwest, as a BOC, "gamed" the divestiture process and Section 271 and has frustrated both the Commission's own goals for the divestiture as well as Touch America's goal of becoming a more viable competitor. But Touch America's complaints are not the only

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[5] In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (1980) ("*Computer II Decision*").

[6] See *Computer III Decision*, supra, n. 4.

evidence of BOC gamesmanship with regulatory requirements. By manipulating the law and their immense dominance in the local markets, the BOCs have accomplished and are accomplishing what many feared, the retention of their monopoly power base over local exchange while making significant inroads into the long distance market. And, in more specific detail, the Commission has evidence before it that Qwest, in particular, has attempted many different schemes to blunt the regulatory requirements that subject it to effective competition, while at the same time attempting to broaden its presence in other markets.[7]

Until there is some real evidence that local markets can be opened effectively or until the current market conditions improve and new entrants regain their footing after the disastrous fallout of the past few years, reducing any protective devices against the BOCs' abuse of their dominant positions in the telecommunications marketplace borders on folly. Moreover, such a step would mark the abandonment of official efforts to introduce and sustain competition in the *all* telecommunications markets, as envisioned by Congress by its passage of the 1996 Act.

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[7] *See* Qwest Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 251(a)(1), WC Docket No. 02-89.

Conclusion

Touch America will read with interest the comments submitted by other parties and submit reply comments as warranted. The Commission has ample evidence from its knowledge of the conditions confronting the industry to know that it is not in the public interest to lift the separate affiliate requirement under Section 272 at this time.

Respectfully submitted,
TOUCH AMERICA HOLDINGS, INC.

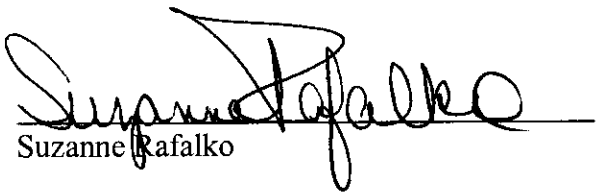
By: _____
Charles H. Helein
Jonathan S. Marashlian
Its Attorneys

Susan Callaghan, Esq.
Senior Counsel
Touch America, Inc.
130 N. Main St.
Butte, Montana 59701

Certificate of Service

I do hereby certify that on this 5th day of August 2002, I caused the foregoing Comments in "In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements" proceeding, WC Docket No. 02-112, to be served on the following:

Marlene H. Dortch, Secretary (Original + 5 copies)
Office of the Secretary
Federal Communications Commission
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002
(Via Hand Delivery)



Suzanne Rafalko